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Supreme Court, U.S.
FILED
JUL 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1837

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PARKVIEW ASSOCIATES,

Appellant,

-vs.-

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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July 11, 1988

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PARKVIEW ASSOCIATES,

Appellant,

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CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellees, the City of the New York, the Commissioner of Buildings, the Department of Buildings, and the Board of Standards and Appeals of the City of New York ("municipal appellees"), move to dismiss the present appeal or, alternatively, to affirm the final order of the Court of

Appeals of the State of New York entered February 9, 1988, on the grounds that the appeal is not within this Court's jurisdiction and does not present a substantial federal question.

QUESTIONS PRESENTED

1. Has appellant, a developer who undertook construction of a 31-story building within a special zoning district in which building heights may not exceed 19 stories, pursuant to a building permit found by the state court to have been invalid when issued on the grounds that it failed to conform to applicable zoning law, raised a substantial federal question, when the state court has construed the zoning law to have imposed a district boundary dating back without change to its original enactment in 1973, thus at all times encompassing the property, and when state law does not protect one's right to build pursuant to an invalidly issued building permit?

2. May the New York State Court of Appeals apply well-settled principles of state common law to preclude the assertion of an estoppel against the City when an estoppel would frustrate the legislative will, when the undisputed facts suggest that this veteran developer's reliance on the codified version of the law, reflecting indicative shading of the actual zoning district boundary, without further inquiry, before constructing a multi-million dollar project on property unquestionably subject to that boundary at purchase, was unreasonable, and when the developer's assertions of actual, good faith reliance are disputed, unexplored on this record, and subject to development and consideration in its pending application for a variance?

FACTS

This appeal concerns the partial revocation of appellant Parkview Associates' ("Parkview's") building permit for premises located at 108 East 96th Street, New York, New York ("the building"). The administrative actions effectuating and sustaining the revocation were based upon findings that, at all relevant dates when Department of Buildings' approvals and permits were issued and revoked, the building failed to conform to applicable zoning law delineating the 96th Street boundary of the Special Park Improvement District ("PI District"), and thus limiting the allowable height of the building. Parkview's application for a variance from the strict enforcement of the height limitation is pending before the Board of Standards and Appeals ("BSA") and will be the subject of a hearing before that body on August 9, 1988.

The PI District was established in 1973 by resolution enacted by the Board of Estimate ("Board"). See Zoning Resolution §§92-00 et seq. The PI District regulations impose upon buildings within the District a maximum height of 19 stories or 210 feet, whichever is less. Zoning Resolution §92-06. As originally enacted, the PI District boundary on 96th Street extended 150 feet east of Park Avenue. Parkview has never disputed this fact.

The building is located on property situated on the south side of 96th Street, commencing 90 feet east of the southeast corner formed by the intersection of 96th Street and Park Avenue, and extending 100 feet east from there. Parkview purchased the property in 1982 at a time when it was unquestionably subject to the 150 foot PI District boundary on 96th Street.

The New York City Charter ("Charter") prescribes the only procedure for changing

the Zoning Resolution, including the zoning map. The zoning map is legisiatively established by the Board through language contained in adopted resolutions and is depicted graphically on the maps contained in the published Zoning Resolution. Sections 197-c and 200 of the Charter vest the Board with the authority, after public hearing, to designate zoning districts and to amend the zoning map following review and recommendation by affected community boards and the City Planning Commission ("CPC"). When acting on such matters, the Board functions in its legislative capacity and approves changes by the adoption of resolutions describing the action taken. The resolutions are available to the public at the offices of the Board and are provided to the Department of Buildings.

The relevant visual depiction of the Zoning Resolution's zoning map containing Parkview's property is map 6b. The only

legislative amendment to the PI District boundary in the vicinity of Parkview's property occurred on March 3, 1983 when the Board approved a resolution reflecting a metes and bounds description of changes reducing the boundary of the PI District from 150 feet to 100 feet east of Park Avenue for only the area between 88th Street and the lower half of the block between 95th and 96th Streets, leaving intact the 150 foot dimension east of Park Avenue for the upper half of the block between 95th and 96th Streets.

Subsequent to the Board's adoption of the resolution effecting these changes, an error in the printing of Zoning Resolution map 6b resulted in the omission of the number "150" and thus the failure to clearly indicate on the visual depiction of the map, other than by the shading, the continuation of the 150 foot dimension on 96th Street. Even so, the shading on the subsequently

printed Zoning Resolution map 6b displayed a longer PI District boundary on 96th Street than on streets to the south. In sum, an examination of the metes and bounds description of the zoning map change of March 3, 1983, as well as a copy of the diagram of the proposed changes presented to the members of the Board on that date clearly revealed the continuation of the 150 foot dimension on 96th Street, but the subsequently printed visual representation of the change, apart from the shading, did not otherwise indicate the 150 foot boundary on 96th Street.

Allegedly upon the invalid assumption that the PI boundary on 96th Street extended only 100 feet east of Park Avenue,[1] Parkview proposed the construction

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[1] Parkview's assertions of actual, reasonable, justifiable, and good faith
(Footnote Continued)

of a building with a height of 19 stories for the 10 feet of the property within 100 feet of Park Avenue and 31 stories for the remainder of the building. Pursuant to §§ 27-140, 27-142 and 27-157 of the New York City Administrative Code, Parkview's architect certified to the Department of Buildings the application's compliance with applicable law. In 1985, a Department of Buildings examiner approved that plan and

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(Footnote Continued)
reliance on the 6b zoning map are contested. The municipal parties have answered these allegations by denying adequate knowledge or information sufficient to form a belief as to their truth. Section 3018(a) of New York's Civil Practice Law and Rules gives these responses the effect of a denial. However, we requested an opportunity for discovery should the estoppel issue not be resolved against Parkview as a matter of law. Throughout this litigation we have urged that estoppel is unavailable as a matter of law and that, alternatively, if it does lie, based on the undisputed facts in the record, Parkview is not entitled to equitable relief. Having rejected Parkview's estoppel claim without a hearing, the state courts did not adjudicate the nature of Parkview's reliance.

the Department of Buildings issued a building permit.

Thereafter, in late 1985, the Department of City Planning circulated a revised map 6b to reflect subsequent but unrelated Board changes of September, 1985. The number "150" was reinserted on this version of the 6b map to clarify the picture.

On July 11, 1986, the Borough Superintendent of the Department of Buildings issued a stop work order for those portions of the building within 150 feet of Park Avenue and at the 20th story and above. The stop work order afforded Parkview 5 days within which to demonstrate compliance with applicable laws or suffer revocation of the permit. On July 21, 1986, Parkview's counsel tendered its arguments to the Commissioner of Buildings. Finding that Parkview had failed to demonstrate compliance, on July 22, 1986, the Commissioner of Buildings revoked the

approval of plans and permits for the building to the extent that such approvals authorized construction above the 19th story (Juris. St. App., pp. 23a-24a). The revocation was based on the developer's failure to demonstrate compliance with applicable zoning law continuing the 150 foot PI District boundary on 96th Street.

On July 23, 1986, Parkview appealed the Commissioner's partial revocation to the BSA. Parkview communicated directly with the Office of the Corporation Counsel concerning the provisions of Charter §669(c), which then provided, in part, that an appeal to the BSA "shall stay all proceedings in furtherance of the action appealed from...." The Corporation Counsel advised Parkview that Charter §669(c) did not have the effect of nullifying the revocation or of otherwise authorizing work without a permit. Despite having been clearly advised that any further construction

at the building would be performed at the developer's own risk of having to subsequently legalize the structure should the BSA sustain the revocation, Parkview continued to perform work on the structure above the 19th story.

On October 14, 1986, the BSA denied Parkview's appeal and sustained the Building Commissioner's partial revocation of the permit (Juris. St. App., pp. 20a-22a). It found that both the metes and bounds Board resolution of March 3, 1983 as well as the October 25, 1982 diagram of proposed changes presented to the Board reflected in words and by dotted lines, respectively, the absence of any change to the PI District boundary on 96th Street and that, in any event, the metes and bounds description controls. Accordingly, it found that the boundary was 150 feet on 96th Street at all dates on which permits were issued and revoked.

Parkview then commenced a proceeding in the New York State Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules challenging as arbitrary the administrative revocation of its building permit and asserting equitable and constitutional objections to the revocation. Parkview claimed that its right to build a 31-story building had vested, that the Department of Buildings should be estopped from strict enforcement of the law, and that the revocation deprived it of property without due process of law or just compensation in violation of the state and federal constitutions. Civitas Citizens, Inc., an interested community group, was permitted to intervene and opposed the petition. The municipal appellees also opposed the petition and counterclaimed for an order enjoining Parkview's maintenance of the building in excess of the lesser of 19

stories or 210 feet and directing the removal of the illegal portion of the building.

OPINIONS BELOW

The State Supreme Court rejected Parkview's claims and dismissed its petition without prejudice to its application for a variance (Juris. St. App., pp. 11a-19a). It sustained the agency determinations that the 96th Street PI District boundary has always been 150 feet, holding that the metes and bounds description of the change in the March 3 resolution controls, rendering Parkview's permit invalid when issued. It rejected the vested rights claim, citing well-settled New York law that no rights arise in consequence of the issuance of invalid permits. It also rejected the estoppel claim, finding the matter controlled by New York's general rule that estoppel is unavailable against the government. Finally, the constitutional claims were found premature and otherwise meritless in light of

the availability of the variance procedure. The Supreme Court also ruled the City's counterclaim premature absent a decision on Parkview's variance application.

By unanimous order, the Appellate Division, First Department, affirmed the order below for the reasons stated by the Justice below (Juris. St. App., pp. 9a-10a). 129 A.D.2d 405, 513 N.Y.S.2d 342 (1st Dept., 1987).

By order entered July 9, 1987, Parkview's appeal to the New York State Court of Appeals pursuant to CPLR §5601(b)(1) was dismissed sua sponte "upon the ground that no substantial constitutional question is directly involved." 70 N.Y.2d 692 (1987). Thereafter, Parkview sought and obtained leave to appeal to the Court of Appeals. 70 N.Y.2d 610 (1987). On February 9, 1988, the Court of Appeals affirmed (71 N.Y.2d 274, 519 N.E.2d 1372

(1988)) and on April 28, 1988, it denied reargument. ___ N.Y.2d ___ (1988).

The Court of Appeals held that Parkview's permit was invalid when issued, finding that the 96th Street PI District boundary, "pursuant to the metes and bounds, remained at all times 150 feet . . . [leaving Parkview's property] unaffected by . . . [the] 1983 change and . . . always . . . governed by the 1973 original enactment." 71 N.Y.2d at 279, 519 N.E.2d at 1373. The Court thus held proper the agency determinations revoking and sustaining the revocation of Parkview's permit. It refused to permit the assertion of an estoppel against the City's enforcement of the law and, in light of the pending variance application, did not otherwise address Parkview's claim to have suffered a taking of

its property without due process or just compensation.[2]

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[2] On this appeal, Parkview has conceded the prematurity of its takings claim. See Juris. St., p. 28 n.8.

ARGUMENT

THIS APPEAL IS NOT WITHIN THIS COURT'S JURISDICTION AND SHOULD BE DISMISSED.

IN ANY EVENT, THE APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION. THE STATE COURT'S CONSTRUCTION OF THE ZONING LAW FORECLOSES ANY CLAIM THAT PARKVIEW ACQUIRED AN INTEREST IN ITS BUILDING PERMIT SUBJECT TO DUE PROCESS PROTECTION. NO DUE PROCESS ISSUE IS OTHERWISE PRESENTED BY THE STATE COURT'S APPLICATION OF NEW YORK'S COMMON LAW OF ESTOPPEL TO THE FACTS OF THIS CASE.

(1)

Parkview's attempt to invoke jurisdiction pursuant to 28 U.S.C. §1257(2) is defective as no statute's validity has here been drawn into question. Prior to its recent amendment (Pub. L. No. 100-352), 28 U.S.C. §1257(2) gave this Court jurisdiction to review a final judgment or decree of New York's State Court of Appeals where there "... is drawn in question the validity of a statute ... on

the ground of its being repugnant to the Constitution, ... and the decision is in favor of its validity." Federal constitutional objections to the exercise of authority pursuant to a statute whose validity is not otherwise challenged cannot form the predicate for an appeal. Hanson v. Denckla, 357 U.S. 235, 244, reh. denied, 358 U.S. 858 (1958); Wilson v. Cook, 327 U.S. 474, 482 (1946). See Silkwood v. Kerr - McGee Corp., 464 U.S. 238, 247, reh. denied, 465 U.S. 1074 (1984). Parkview's claim to have been deprived of property without due process of law is based on its objections to the revocation of its building permit. It thus asserts a challenge to the effect of the exercise of authority under local law without otherwise drawing into question the constitutional validity of any statute. Thus, this Court lacks jurisdiction of the appeal.

(2)

In any event, this appeal presents no substantial federal constitutional question. Parkview's effort to demonstrate otherwise through its oblique presentation of the issues represents nothing more than an attempt to bring before this Court its dissatisfaction with the Court of Appeals' resolution of its state law claims. By sustaining the finding that the PI District boundary on 96th Street is and has always been 150 feet, the Court of Appeals has properly construed applicable local law to have conferred no legally protected interest in the building permit and has, in so doing, properly rejected the contention that the insertion of the number "150" on zoning map 6b in 1985 constituted a substantive change in the law. Thus, the Court of Appeals' construction of local law forecloses Parkview's assertion of due process claims.

Nor does the Court of Appeals' treatment of the case as one involving simple mistake rather than a discretionary interpretation which, although reasonable, is nonetheless erroneous, and its attendant suggestion on the facts of this case that a good faith inquirer's reasonable diligence would have disclosed the boundary's true location, raise a substantial due process issue warranting this Court's review. This is especially so when the pendency of the variance application makes the extent of Parkview's harm, if any, incapable of determination at this time.

Parkview here attempts to re-litigate in assertedly constitutional form the questions of state and local law disposed of by New York's highest state court. But as this Court long ago commented:

> ... the Fourteenth Amendment cannot be availed of "as a means of bringing to the test of the decision of this court the abstract

> opinions of every unsuccessful litigant in the state court of the justice of the decision against him . . . ."

New York and New England Railroad Company v. Bristol, 151 U.S. 556, 570 (1894), quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877). Parkview's constitutional characterization of its appeal should be rejected with a finding that it presents no substantial federal question.

A. Parkview is foreclosed from raising procedural due process claims.[4]

The state law determination that the PI District boundary on 96th Street has never

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[4] We characterize as procedural due process claims those of Parkview's contentions that are predicated on the assertion that the PI District boundary was redrawn before the permit was issued and was revised or reinterpreted sometime thereafter. This issue is not premature and was not so treated by the Court of Appeals. Rather, it was disposed of through the Court's construction of the zoning law.

been changed from 150 feet is beyond this Court's review. See, e.g., 324 Liquor Corp. v. Duffy, 479 U.S. 335, ___ n.6, 107 S.Ct. 720, 725 n.6 (1987). It compels two conclusions as a matter of state law: 1) that Parkview's building permit was void as having been issued without statutory authority, conferring no property interest subject to due process protection; and 2) that the 1985 insertion of the number "150" on the codified zoning map 6b was without legal significance.

Parkview concedes that the Court of Appeals resolved a question of state law by sustaining the agency determinations that the PI District boundary is 150 feet from Park Avenue at 96th Street (Juris. St., p. 16). Its assertions of constitutional infirmity, however, are premised on its inappropriate effort to impeach this holding. Parkview's claim to have been deprived of property without due process of law assumes that it

possessed a property interest subject to due process protection. Parkview essentially argues that the Board redrew or should be found to have redrawn the 96th Street PI District boundary on March 3, 1983, making its building permit lawful when issued, and giving rise to a protectible right to construct a 31-story building on so much of the property as extends beyond 100 feet of Park Avenue. See Juris. St., pp. 6-8, 24. So, Parkview continues, the insertion of the number "150" on the codified zoning map 6b in 1985 is claimed to have been a "secret revision" (Juris. St., pp. 10, 20) of the zoning map that deprived it of property without sufficient notice or adequate opportunity to mitigate the consequences of the purported deprivation. Parkview makes no claim directed to the propriety of the procedures employed in effecting the revocation; nor does it claim any constitutional infirmity deriving from or any

violation of the Charter's statutory requirements governing amendment of the zoning law. See Charter §§ 197-c and 200. Rather, its contention is that the City applied to Parkview's pre-existing property interest a substantively revised or reinterpreted zoning map.

Parkview's formulation of the issue suffers from the fallacy of assuming a predicate that was found against it as a matter of state law, viz., that the PI District boundary on 96th Street was redrawn before its permit was issued. Due process guarantees apply only to those property interests created or defined by "... an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). While it is true that, once a property interest is found in state law, the federal constitution measures the adequacy of procedures employed for its deprivation (see Cleveland Board of

Education v. Loudermill, 470 U.S. 532, 541 (1985)), the threshold question of whether a property interest exists must be answered by reference to a source independent of the constitution, such as state law. The Court of Appeals in the instant case has answered that question by construing local zoning law and by holding that, as so construed, Parkview acquired no legally protected right under state law. 71 N.Y.2d at 279-282, 519 N.E.2d at 1373-1375. This state court determination forecloses Parkview's claim of constitutional infirmity.

The construction given the zoning law by the Court of Appeals is binding on this Court. 324 Liquor Corp. v. Duffy, 479 U.S. 335, ___ n.6, 107 S. Ct. 720, 725 n.6 (1987); O'Brien v. Skinner, 414 U.S. 524, 531 (1974); Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684, 688 (1959). See also Guaranty Trust Co. v.

Blodgett, 287 U.S. 509, 513 (1933); Telluride Power Transmission Co. v. Rio Grande Western Railway Co., 187 U.S. 569, 584 (1903). The Court of Appeals construed the zoning law to have imposed a 150 foot PI District boundary on 96th Street from the date of its 1973 enactment through the present, without any change having been effected by intervening legislative amendments to the zoning map or by insertion of the number "150" on the codified version of the zoning map. This construction of the governing zoning law is beyond this Court's review.

Equally unimpeachable in this Court are the legal conclusions that arise under New York law from the fact that the PI District boundary on 96th Street is and has always been 150 feet. The Administrative Code leaves the Commissioner of Buildings without discretion to approve a permit application that fails to conform to applicable provisions

of law, and authorizes the revocation of a permit issued in error when conditions are such that a permit ought not have been issued. Administrative Code §§27-191 and 27-197. See Citizens for the Preservation of Windsor Terrace v. Smith, 122 A.D.2d 827, 505 N.Y.S.2d 896 (2d Dept., 1986). Accordingly, the Court of Appeals properly concluded that Parkview's permit was invalid when issued, as purporting to authorize construction in excess of the statutory height limitation within the 150 foot PI District boundary, and was thus properly revoked. Under long-standing principles of state law, no claim of vested rights can arise in consequence of the issuance of invalid building permits. Natchev v. Klein, 41 N.Y.2d 833, 834, 361 N.E.2d 1043, 1044 (1977); Jayne Estates, Inc. v. Raynor, 22 N.Y.2d 417, 422, 239 N.E.2d 713, 715 (1968); Perrotta v. City of New York, 107 A.D.2d 320, 325, 486 N.Y.S.2d 941, 945 (1st

Dept.), aff'd, 66 N.Y.2d 859, 489 N.E.2d 255 (1985). See also B & G Construction Corp. v. Board of Appeals, 309 N.Y. 730, 732, 128 N.E.2d 423, 424 (1955); City of Buffalo v. Roadway Transit Co., 303 N.Y. 453, 463, 104 N.E.2d 96, 100 (1952); Albert v. Board of Standards and Appeals, 89 A.D.2d 960, 962, 454 N.Y.S.2d 108, 110-111 (2d Dept., 1982), app. dism., 59 N.Y.2d 673 (1983). Under New York law, Parkview acquired no legally cognizable right to construct a 31-story building within 150 feet of Park Avenue.[5]

Even if this Court were to examine the Court of Appeals' construction of the zoning

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[5] It is for this reason that Parkview's reliance on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and its progeny is misplaced. See Juris. St., pp. 20-22. A threshold state law property interest was a necessary predicate to the application of due process guarantees in those cases and Parkview can make no claim to such an interest here.

law, we submit that it should conclude, as did the state court, that the PI District boundary on 96th Street is and has always been 150 feet, making Parkview's permit invalid when issued. This conclusion is evident from an examination of the proceedings effecting the zoning map change of March 3, 1983, for Parkview does not dispute the fact that the boundary was 150 feet prior to that time and does not suggest that the boundary's alteration was effected by some other legislative act.[6]

On March 3, 1983, the Board of Estimate enacted a resolution approving

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[6] Parkview cites May 24, 1984 Board of Estimate legislative changes to map 6b in support of its assertion that the boundary change it claims was effected in 1983 was carried forward through subsequent proceedings (Juris. St., pp. 8, 18). Parkview has never claimed that the 96th Street PI District boundary was affected by any legislation other than the March 3, 1983 Board of Estimate resolution.

certain zoning map changes that unequivocally retained the 150 foot PI District boundary on 96th Street. Both the text describing the changes and their graphic representation on the CPC certified diagram of October 25, 1982, submitted to the Board in support of CPC's recommendation to approve the changes, clearly reflect no change to the 96th Street PI District boundary. The October 25, 1982 CPC diagram showed that only the area enclosed by a dotted line was proposed to be altered, and the dotted line extended north only to the midblock between east 95th Street and east 96th Street. More importantly, the metes and bounds description of the changes contained in the resolution reflected in words the absence of any reduction to 100 feet on 96th Street.

Indeed, Parkview concedes that the Board's metes and bounds description reveals no reduction in the 150 foot boundary. See

Juris. St., p. 7. Its factual assertion that the October 25, 1982 diagram shows a reduction on 96th street was rejected by every court below, as the diagram does not include 96th Street in the change and is thus consistent with the metes and bonds description.[7]

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[7] Even assuming, arguendo, that the October 25 diagram did not clearly accord with the Board's metes and bounds description of the zoning map change, the description would nonetheless control so as to result in an unambiguous continuation of the 150 foot dimension on 96th Street. Specific statutory provisions prevail over general ones. See Sutherland Stat. Const. §46.05 (4th Ed.); People v. Mobil Oil Corp., 48 N.Y.2d 192, 199-200, 397 N.E.2d 724, 728 (1979); Zoning Resolution §12-01. Thus, within the resolution itself, the particular metes and bounds description controls the general reference to the October 25 diagram.

Moreover, because the Board's resolution constitutes the legislation effecting the map change and contains a clear and unambiguous metes and bounds description of the change, it leaves no doubt that the map change continued the 150 foot PI District dimension on 96th Street. See Mallett v. Village of Mamaroneck, 283 App. Div. 1094, 1094-1095, 131 N.Y.S.2d 504, 505 (2d Dept., 1954), (Footnote Continued)

The issue in this case stems from an error in printing the Zoning Resolution version of the 6b zoning map subsequent to the Board's approval of certain changes on March 3, 1983. That error lends no support to Parkview's assertion that the zoning map in effect when its permit was issued reflected a reduction of the PI District boundary to 100 feet. The problem is not unlike that which results when a provision of positive law, actually and specifically enacted by proper authority, is at variance with the codified version of the law. For example, such cases of inconsistency between the Statutes at Large, enacted as positive law, and the codified United States Code are

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(Footnote Continued)
aff'd, 308 N.Y. 821, 125 N.E.2d 873 (1955). Compare Soron Realty Co., Inc. v. Town of Geddes, 23 A.D.2d 165, 168, 259 N.Y.S.2d 559, 561-562 (4th Dept., 1965); Matter of H.P.V.T. Corp. v. McGuire, 58 Misc. 2d 159, 162-163, 294 N.Y.S.2d 787, 791 (Sup. Ct., Suffolk Co., 1968).

resolved with the rule that the positive law prevails over the codification. American Bank & Trust Co. v. Dallas County, 463 U.S. 855, 864 n.8, reh. denied, 463 U.S. 1250 (1983); United States v. Welden, 377 U.S. 95, 98 n.4 (1964); Stephan v. United States, 319 U.S. 423, 426 (1943). In the instant case, the textual metes and bounds description of the zoning map change, having been actually and specifically enacted by the Board by its resolution of March 3, 1983, prevails over any inconsistency in the graphic representation of the change reflected in the subsequent printing of the Zoning Resolution's maps.[8]

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[8] No significance attaches to the fact that the Department of City Planning sponsors the publication of the Zoning Resolution (see Juris. St., pp. 5-7). The Department of City Planning necessarily functions in different capacities as the source of proposed zoning map changes and as publisher of those changes enacted by the (Footnote Continued)

This conclusion properly recognizes the fact that map 6b is not a statute and that the Board does not legislate zoning changes by enacting pictures. The statutory enactment in the present matter is the Board's March 3 resolution. Indeed, New York City's statutory zoning is reflected exclusively in the Board's resolutions. Zoning is a state and local function, and the fixing of zoning district boundaries is a legislative act that must be effected by a legislative body. See, e.g., Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir.), cert. denied, 459 U.S. 989 (1982); Shapiro v. Town of Oyster Bay, 27 Misc. 2d 844, 846-847, 211 N.Y.S.2d 414, 417 (Sup. Ct., Nassau Co., 1961), aff'd, 20

(Footnote Continued)
Board. No administrative printing error can change the controlling legislative action of the Board as reflected in the language of its resolutions.

A.D.2d 850, 249 N.Y.S.2d 663 (2d Dept., 1964). The graphic representations of zoning district boundaries contained in the published Zoning Resolution's zoning maps are codifications without independent legal effect. The Board's March 3 enacted resolution unequivocally maintained the 150 foot dimension on 96th Street notwithstanding the printing error on the codified version of map 6b.

Parkview's reliance on the interpretive provisions of Zoning Resolution §76-131(c)[9] and on the incorporation provisions of Zoning Resolution §11-14[10] begs the question

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9 See Juris. St., pp. 7, 10. Zoning Resolution §76-131(c) provides that in situations there specified where "no dimensions are shown" the boundary shall be 100 feet.

10 See Juris. St., p. 5. Zoning Resolution §11-14 incorporates into the Resolution the zoning maps depicting the location and boundaries of zoning districts.

in this case. The interpretive provisions of §76-131(c) apply only where no dimensions are shown, but the Board's March 3 resolution clearly indicates dimensions. Indeed, these interpretive provisions have no independent legal significance with respect to the fixing of zoning district boundaries. Moreover, the incorporation provisions of §11-14 simply cannot be held to incorporate a visual depiction of the zoning map at odds with the statutory zoning map enacted through the Board's adoption of its resolution. See Zoning Resolution §§11-22 and 12-01(a) and (b) (Juris. St. App., p. 27a) (providing, respectively, that, as to provisions covering the same subject matter, the more restrictive shall govern, that the particular controls the general, and that the text controls over any illustration). The Board's resolution constitutes the legislation fixing the PI District boundary on 96th Street and retaining it unequivocally at 150

feet. It is that controlling resolution that is incorporated into the published Zoning Resolution.

The Court of Appeals thus properly construed New York City's zoning law to have imposed a 150 foot PI District boundary on 96th Street dating back without change to the establishment of the PI District in 1973. In light of this construction, there can be no claim that the 1985 insertion of the number "150" on a version of Zoning Resolution map 6b circulated after Parkview's permit was issued constituted a substantive change in, or revision of, the boundary. The insertion of the number effected no legal alteration at all, as the zoning map change, as statutorily enacted by the Board on March 3, maintained this 150 foot boundary. The insertion of the number constituted a ministerial act of clarifying the codification by placing the number "150" where it was otherwise prescribed by law and where the

shading otherwise indicated it to be. Under the circumstances of this case, Parkview has received all the process it was due. See Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915); Rogin v. Bensalem Township, 616 F.2d 680, 692-694 (3d Cir., 1980), cert. denied sub nom. Mark-Garner Associates, Inc. v. Bensalem Township, 450 U.S. 1029 (1981).

In sum, Parkview acquired no interest in its building permit subject to due process protection, nor were its rights in any way impaired by the simple act of placing the number "150" where the law already fixed a 150 foot boundary. This appeal presents no substantial federal question warranting this Court's review.

B. No due process issue is presented by the Court of Appeals' application of New York's common law of estoppel to the facts of this case.

(1)

Parkview's assertion of constitutional infirmity deriving from the Court of Appeals' disposition of the estoppel issue (see Juris. St., pp. 22-27) does not present a substantial federal question. Parkview here inappropriately re-argues its estoppel claim. Application of state common law principles of estoppel is simply not within this Court's authority to entertain. Michigan v. Flint and Pere Marquette Railroad Co., 152 U.S. 363, 368 (1894). Moreover, on the facts of this case there is nothing so shocking about the application of state law so as to warrant invalidation on federal constitutional grounds. Thus, the appeal should be

dismissed for want of a substantial federal question.[11]

The Court of Appeals in the instant case applied well-settled principles of New York State's common law of estoppel. On the basis of ample precedent, it held that this case is governed by the general rule in New York that estoppel is unavailable to prevent a governmental agency from enforcing a statute or to ratify administrative error in the issuance of a

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[11] The Court of Appeals did not expressly pass upon a purported due process claim independent of the estoppel issue and of Parkview's claim to have suffered a taking of its property without due process or just compensation. In such an instance, absent a demonstration to the contrary, it is assumed that the failure to address the question was due to a failure to have properly presented it in the state court. Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n.3 (1983); Street v. New York, 394 U.S. 576, 582 (1969). Parkview has not demonstrated that it properly presented in the state courts its claim that application of New York's estoppel law deprives it of property without due process of law.

building permit. 71 N.Y.2d at 282, 519 N.E.2d at 1374-1375. See Perrotta v. City of New York, 66 N.Y.2d 859, 489 N.E.2d 255 (1985); City of New York v. City Civil Service Commission, 60 N.Y.2d 436, 448-449, 458 N.E.2d 354, 361 (1983); Matter of Hamptons Hospital and Medical Center v. Moore, 52 N.Y.2d 88, 93, 417 N.E.2d 533, 536 (1981). See also City of Yonkers v. Rentways, Inc., 304 N.Y. 499, 505, 109 N.E.2d 597, 599 (1952); New York City Employees' Retirement System v. Eliot, 267 N.Y. 193, 203, 196 N.E. 23 (1935). The Court acknowledged "... those policy reasons which foreclose estoppel against a governmental entity in all but the rarest cases...." 71 N.Y.2d at 282, 519 N.E.2d at 1375. These policy considerations consist in the important public interest in preserving the separation of powers and in insuring that the law as enacted - including those portions of the City's comprehensive zoning

scheme that prescribe the PI District height limitation as well as provisions for its variation - be enforced as written. On the facts of this case, the Court of Appeals found no occasion to depart from the general no estoppel rule.[12]

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[12] This is not to say that the New York state courts adhere blindly to this result. Rather, they perform a careful case-by-case analysis and have not hesitated to prevent strict enforcement of the law when private parties have secured vested rights under a permit valid when issued but assertedly affected by a subsequent change in the law or when the government has been found to have acted in bad faith. See Faymor Development Co. v. Board of Standards and Appeals, 45 N.Y.2d 560, 565-566, 383 N.E.2d 100, 102-103 (1978); Matter of Pokoik v. Silsdorf, 40 N.Y.2d 769, 772, 358 N.E.2d 874, 876-877 (1976); Matter of Temkin v. Karagheuzoff, 34 N.Y.2d 324, 328-329, 313 N.E.2d 770, 772 (1974); Landmark Colony at Oyster Bay v. Board of Supervisors, 113 A.D.2d 741, 743-744, 493 N.Y.S.2d 340, 343 (2d Dept., 1985); Lefrak Forest Hills Corp. v. Galvin, 40 A.D.2d 211, 218-219, 338 N.Y.S.2d 932, 939 (2d Dept., 1972), aff'd, 32 N.Y.2d 796, 298 N.E.2d 685, cert. denied, 414 U.S. 1004 (1973). Parkview has made neither showing in the instant case. Indeed, it is for this reason that Parkview's

(Footnote Continued)

Parkview essentially asks this Court to require New York State to adopt a common law estoppel rule covering instances where an agency has reached a plausible, but erroneous interpretation of the law. See Juris. St., pp. 24-26. But New York's Court of Appeals has declined to embrace this rule and no constitutional impropriety can thus arise. More importantly, this case is not an instance that may properly be regarded as one of a governmental agency's reasonable, though erroneous interpretation of law.[13] No infirmity results from the

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(Footnote Continued)
citations to Dobbins v. City of Los Angeles, 195 U.S. 223 (1904), Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir., 1981), cert. denied, 456 U.S. 973 (1982), and People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952) are unavailing (Juris. St., pp. 23-24). These cases are based on a vested rights analysis, and Parkview has not acquired vested rights.

[13] A true interpretation case is one where a statute as enacted by the legislature contains
(Footnote Continued)

Court of Appeals' refusal to treat the case in

(Footnote Continued)
general terms capable of application on a case-by-case basis, and gives to an administrative agency the authority to reach any of a number of permissible results through the exercise of its administrative discretion, so long as that discretion is not exercised arbitrarily. In such cases, differential application of the statutes contravenes no indication of legislative will because the legislative will has not been immutably fixed. Cox v. Louisiana, 379 U.S. 559, reh. denied, 380 U.S. 926 (1965) (see Juris. St., p. 26) is such a case, where the statute prohibited demonstrations "near" a courthouse, but did not define the term "near," leaving to police officials the task of determining on a case-by-case basis what "near" means. United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973) ("PICCO") (see Juris. St., p. 26) is also such a case, where a statute had been once interpreted by the Army Corps of Engineers to allow unpermitted dumping of deposits that did not impede navigation. (Indeed, both Cox and PICCO are criminal cases, making them inapplicable on this ground in addition to the fact that they are interpretation cases and the present one is not.)

The present matter simply does not fit the reasonable interpretation model. It is not an instance where the statute sets forth a general term capable of differential application on varying facts. The zoning law prescribes in unambiguous terms and in

(Footnote Continued)

the manner Parkview suggests.

Nor is Parkview's argument aided by citation to cases such as Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) and Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) involving the retroactive application of new legislative, regulatory, or judicial rules. See Juris. St., pp. 23-24. As demonstrated, this is not a case in which the governing rule was changed at all; it was simply misapplied in error. Moreover,

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all circumstances a 150 foot PI District boundary on 96th Street and a clear height limitation within the PI District of the lesser of 19 stories or 210 feet. There was no interpretation of the law here at all. Rather, there was clerical error in printing the codification and a single official's error in administering the law through the issuance of an invalid building permit. Thus, even if some constitutional infirmity could be imputed to the Court of Appeals' refusal to treat this case as an example of a reasonable, albeit erroneous interpretation of law, Parkview cannot plausibly suggest that this case is an appropriate vehicle for adopting that rule.

because the PI District boundary has never been changed, Parkview, unlike one truly aggrieved by the retroactive application of a new rule of law, possessed no legally protected interest capable of defeasance.[14]

(2)

Parkview suffers no violation of its due process rights through the Court of Appeals'

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[14] Far from being a "fiction," (Juris. St., p. 24) the fact that Parkview acquired no property interest in constructing a 31-story building within 150 feet of Park Avenue is a conclusion dictated by state law. The Administrative Code expressly conditions the issuance of a building permit on compliance with applicable law, and authorizes its revocation if it was issued in error and conditions are such that it ought not have been issued. Administrative Code §§ 27-191 and 27-197. As shown, supra, pp. 27 - 29, the permit was invalid when issued and cannot under New York law confer any vested right to build. This is in stark contrast to the recharacterization of state-recognized rights found bogus in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 539 n.5 (1985) and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980). See also Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 11-12 (1978).

application to the facts of this case of the general rule foreclosing estoppel against the City. To the extent that Parkview takes issue with the Court of Appeals' purported refusal to adjudicate this claim (Juris. St., pp. 27-29), its contention should be rejected.[15] The so-called enormity of Parkview's "forfeiture" (Juris. St., p. 26) is incapable of determination before the variance proceeding is completed. In this respect, Parkview's due process claim suffers from an infirmity similar to that concededly applicable to its takings claim - it is not ripe. See Pennell v. City of San Jose, ___ U.S. ___, 108 S. Ct. 849, 857 n.5 (1988); Hodel v. Indiana, 452 U.S. 314,

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[15] We suggest that the due process implications of application of the estoppel rule were not properly presented to the Court of Appeals. See supra at 41 n.11. To the extent that they were, the due process claim is as premature as the takings claim and is otherwise meritless.

335-336 (1981); Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 304 (1981). Cf. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 191-192 n.12, 199-200 (1985). Compare Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926). Parkview raises no facial constitutional challenge in this case, and this record does not present any tangible evidence of the consequences to Parkview of the permit revocation at issue. No one is in a position to know Parkview's ultimate harm until it is determined whether the offending 12 stories will be legalized by a variance. Parkview's due process claim is prematurely asserted.

Moreover, on this record, Parkview's assertions of actual, reasonable, and good faith reliance on map 6b are contested. These are facts peculiarly within Parkview's knowledge but which, because of the

applicability of the general estoppel rule and the dispositions below, were not developed.[16] It is in the upcoming variance process that a full factual record will be made in accordance with sections 666 and 668 of the New York City Charter and §72-21 of the Zoning Resolution. Among the open issues the BSA will consider is whether "... the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner." Zoning Resolution §72-21(d). In the event that Parkview's application for a variance is denied, it can challenge that determination in the state courts. See, e.g., Matter of Cowan v. Kern, 41 N.Y.2d 591, 363 N.E.2d 305 (1977). This record simply affords no basis for adjudicating Parkview's claim to have

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16 See supra at 8 n.1.

been deprived of property without due process of law.

In any event, there is nothing so shocking or offensive to civilized notions of decency in the Court of Appeals' application of the estoppel rule to the facts of this case so as to warrant invalidation of the revocation on constitutional grounds. Given that Parkview's permit was issued without statutory authority, there was nothing arbitrary about its revocation. Parkview's reliance on Moore v. City of East Cleveland, 431 U.S. 494 (1977) and Rochin v. California, 342 U.S. 165 (1952) for the proposition that the City's action "contravenes a basic sense of justice" (see Juris. St., p. 26)[17] is misplaced. Moore

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[17] We suggest that the issues of discrimination treated in Examining Board of Engineers v. Flores de Otero, 426 U.S. 572, (1976), Schneider v. Rusk, 377 U.S. 163 (Footnote Continued)

and Rochin gave content to the substantive due process guarantee of liberty in circumstances in which it was threatened by regulation "... slicing deeply into the family itself," possessing only a "tenuous relation" to the government's otherwise legitimate objectives (Moore, 431 U.S. at 498, 500) and by police techniques "... too close to the rack and the screw to permit of constitutional differentiation" (Rochin, 342 U.S. at 172). Parkview has no such cognizable interest at stake and cannot be found to have been subjected to governmental action so arbitrary or unreasonable on these facts as to shock the conscience.

Although this record leaves unexplored the issues of Parkview's actual, reasonable,

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(1964), and Bolling v. Sharpe, 347 U.S. 497 (1954) (Juris. St., p. 26) have no relevance to the instant case.

and justifiable reliance on zoning map 6b, it nonetheless contains certain undisputed facts suggesting that Parkview's reliance on the codification, without further inquiry, was unreasonable. Zoning map 6b reflected shading indicating a longer PI District boundary on 96th Street than on streets to the south. Both Parkview's principal and the architect it employed are experienced, and there has never been any question but that Parkview's property was subject to the 150 foot boundary at the time of its purchase in 1982. Indeed, when purchasing a piece of property, one might not uncommonly inquire as to its development potential. In these circumstances, Parkview's reliance on the 6b zoning map, without further inquiry as to the boundary's actual location, may not have been reasonable. The Court of Appeals' ruling sustaining the permit revocation and refusing to estop the City from strict enforcement of the law thus does

not sanction governmental action that on these facts even remotely approaches that which is so offensive to a basic sense of justice as to warrant invalidation on substantive due process grounds.[18]

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[18] Parkview misses the point by claiming that due process prevents it from being charged with knowledge of the boundary's actual location. See Juris. St., pp. 17-20. First, the cases it relies on for this proposition concern the application to cognizable legal interests of statutes expressly directing their extinguishment under certain conditions. See Hodel v. Irving, ____ U.S. _____, 107 S. Ct. 2076 (1987); United States v. Locke, 471 U.S. 84 (1985); Texaco, Inc. v. Short, 454 U.S. 516 (1982). They have no application to the present matter where a long-standing statutory prescription is applied to revoke a permit that should not have been issued in the first instance. Moreover, the Court of Appeals' suggestion that a good faith inquirer's reasonable diligence would have disclosed the boundary's true location cannot be read as anything more than a statement that, based on the uncontested facts in this record, it is not unreasonable to have required Parkview to inquire further and so to charge it with constructive notice of what the law has provided since 1973. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-385 (1947). That the

(Footnote Continued)

Estoppel is ultimately an equitable doctrine. See Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 59 (1984). Yet the facts as presented on this record do not support its application. On the one hand, Parkview continued construction above the 19th story during the pendency of its appeal to the BSA after having been advised by the City's top legal advisor of the consequences of an unsuccessful appeal. Indeed, Parkview did not file its variance application with the BSA until May, 1987, nearly ten months after its permit was revoked.

On the other hand, there has never been a suggestion in this case that the

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published Zoning Resolution has been designed as a convenience to members of the development community does not relieve them of the responsibility of ascertaining what the law in no uncertain terms specifies especially where, as here, the facts suggest further inquiry to have been in order.

Department of Buildings has proceeded in anything but good faith and at the first known opportunity to correct the consequences of municipal error in order to insure the integrity of the City's zoning law. The critical municipal planning and development objectives that underlie the City's overall zoning scheme would be severely undercut by a judicially sanctioned overbuilding of Parkview's property. The zoning law reflects a uniform system of regulation and control and includes provision for varying the strict application of the law upon satisfaction of the required showings. See Zoning Resolution §72-21. It is essential that developers adhere to the overall scheme of regulation and control set forth by the zoning law lest the public interest in orderly and consistent development be utterly undermined. Moreover, the grant of relief in this case would remove any incentive for developers and their architects to take a

responsible part in the permit approval process by sending a clear signal that those who do a slipshod job of certifying compliance with the zoning laws, and who manage to get away with it in the approval process, may benefit from the mutual mistake.

Parkview in effect attempts to constitutionalize its estoppel claim. But a substantial federal question cannot be created by giving a constitutional gloss to routine zoning disputes that can be and have in this case been adequately addressed by state courts. Hynes v. Pasco County, Florida, 801 F.2d 1269, 1270 (11th Cir., 1986); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 831-834 (1st Cir.), cert. denied, 459 U.S. 989 (1982); Studen v. Beebe, 588 F.2d 560, 566 (6th Cir., 1978). See also Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1035-1036 (3d Cir.), cert. denied, ___ U.S.

___, 107 S. Ct. 2482 (1987); Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58-59 (2d Cir., 1985); South Gwinnett Venture v. Pruitt, 491 F.2d 5, 7 (5th Cir.) (en banc), cert. denied, 419 U.S. 837 (1974). Thus, this case presents no substantial federal question.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION. ALTERNATIVELY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED. IF THE JURISDICTIONAL STATEMENT IS TREATED AS A PETITION FOR A WRIT OF CERTIORARI, THE PETITION SHOULD BE DENIED.

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